

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

JOHN DEGEN, SR.,

Plaintiff,

v.

WASHOE COUNTY DISTRICT  
ATTORNEY, et al.,

Defendants.

3:19-cv-00597-MMD-CLB

**REPORT AND RECOMMENDATION  
OF U.S. MAGISTRATE JUDGE<sup>1</sup>**

Before the court is Plaintiff John Degen's ("Degen"), application to proceed *in forma pauperis* (ECF No. 5), and his amended *pro se* civil rights complaint<sup>2</sup> (ECF No. 3). For the reasons stated below, the court recommends that Degen's *in forma pauperis* application (ECF No. 5) be granted, and that his amended complaint (ECF No. 3) be dismissed without prejudice and without leave to amend.

**I. IN FORMA PAUPERIS APPLICATION**

A person may be granted permission to proceed *in forma pauperis* ("IFP") if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

The Local Rules of Practice for the District of Nevada provide: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]."

<sup>1</sup> This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

<sup>2</sup> The court finds the amended complaint (ECF No. 3) to be the operative complaint in this case.

1 The application must be made on the form provided by the court and must include a financial  
2 affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

3 "[T]he supporting affidavit [must] state the facts as to [the] affiant's poverty with some  
4 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir.  
5 1981) (quotation marks and citation omitted). A litigant need not "be absolutely destitute to  
6 enjoy the benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331,  
7 339 (1948).

8 A review of the application to proceed IFP reveals Degen cannot pay the filing fee;  
9 therefore, the court recommends that the application (ECF No. 5) be granted.

## 10 **II. SCREENING STANDARD**

11 Inmate civil rights complaints are governed by 28 U.S.C. § 1915A. Section 1915A  
12 provides, in relevant part, that "the court shall dismiss the case at any time if the court  
13 determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim  
14 upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is  
15 immune from such relief." 28 U.S.C. § 1915A(b). A complaint is frivolous when "it lacks an  
16 arguable basis in either law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). This  
17 includes claims based on legal conclusions that are untenable (e.g., claims against  
18 defendants who are immune from suit or claims of infringement of a legal interest which  
19 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,  
20 delusional scenarios). *Id.* at 327–28; *see also McKeever v. Block*, 932 F.2d 795, 798 (9th  
21 Cir. 1991). Dismissal for failure to state a claim under § 1915A incorporates the same  
22 standard applied in the context of a motion to dismiss under Federal Rule of Civil Procedure  
23 12(b)(6), *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012), which requires dismissal  
24 where the complaint fails to "state a claim for relief that is plausible on its face," *Bell Atl.*  
25 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

26 The complaint is construed in a light most favorable to the plaintiff. *Chubb Custom*  
27 *Ins. Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The court must

1 accept as true all well-pled factual allegations, set aside legal conclusions, and verify that  
 2 the factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679  
 3 (2009). The complaint need not contain detailed factual allegations, but must offer more  
 4 than “a formulaic recitation of the elements of a cause of action” and “raise a right to relief  
 5 above a speculative level.” *Twombly*, 550 U.S. at 555. Particular care is taken in reviewing  
 6 the pleadings of a *pro se* party, for a more forgiving standard applies to litigants not  
 7 represented by counsel. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). Still, a liberal  
 8 construction may not be used to supply an essential element of the claim not initially pled.  
 9 *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). If dismissal is appropriate, a *pro se*  
 10 plaintiff should be given leave to amend the complaint and notice of its deficiencies, unless  
 11 it is clear that those deficiencies cannot be cured. *Cato v. United States*, 70 F.3d 1103,  
 12 1107 (9th Cir. 1995).

### 13 **III. SCREENING OF AMENDED COMPLAINT**

14 In his amended complaint, Degen sues Defendants Washoe County District Attorney  
 15 and Washoe County Public Defender under 42 U.S.C. § 1983. (See ECF No. 3.) The  
 16 complaint relates to Degen’s underlying state criminal case and subsequent appeal. (*Id.*)  
 17 Degen asserts three counts and alleges that the Washoe County District Attorney and  
 18 Washoe County Public Defender made a number of errors in his criminal case and appeal.  
 19 (*Id.*) It is unclear from the amended complaint what relief Degen seeks.

20 42 U.S.C. § 1983 aims “to deter state actors from using the badge of their authority  
 21 to deprive individuals of their federally guaranteed rights.” *Anderson v. Warner*, 451 F.3d  
 22 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000)).  
 23 The statute “provides a federal cause of action against any person who, acting under color  
 24 of state law, deprives another of his federal rights[.]” *Conn v. Gabbert*, 526 U.S. 286, 290  
 25 (1999), and is “merely . . . the procedural device for enforcing substantive provisions of the  
 26 Constitution and federal statutes.” *Crompton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).  
 27 Claims under § 1983 require the plaintiff to allege (1) the violation of a federally-protected

1 right by (2) a person or official who acts under the color of state law. *Anderson*, 451 F.3d at  
2 1067.

3 However, § 1983 is not a backdoor through which a federal court may overturn a  
4 state court conviction or award relief related to the fact or duration of a sentence. Section  
5 1983 and “the federal habeas corpus statute . . . both provide access to the federal courts  
6 ‘for claims of unconstitutional treatment at the hands of state officials, . . . [but] they different  
7 in their scope and operation.’” *Ramirez v. Galaza*, 334 F.3d 850, 854 (9th Cir. 2003) (quoting  
8 *Heck v. Humphrey*, 512 U.S. 477, 48 (1994)). Federal courts must take care to prevent  
9 prisoners from relying on § 1983 to subvert the differing procedural requirements of *habeas*  
10 *corpus* proceedings under 28 U.S.C. § 2254. *Heck*, 512 U.S. at 486-87; *Simpson v.*  
11 *Thomas*, 528 F.3d 685, 695 (9th Cir. 2008). When a prisoner challenges the legality or  
12 duration of his custody, raises a constitutional challenge which could entitle him to an earlier  
13 release, or seeks damages for purported deficiencies in his state court criminal case, which  
14 effected a conviction or lengthier sentence, his sole federal remedy is a writ of *habeas*  
15 *corpus*. *Edwards v. Balisok*, 520 U.S. 641, 648 (1997); *Heck*, 512 U.S. at 481; *Wolf v.*  
16 *McDonnell*, 418 U.S. 539, 554 (1974); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Simpson*,  
17 528 F.3d at 692-93. Stated differently, where “a judgment in favor of the plaintiff would  
18 necessarily imply the invalidity of his conviction or sentence,” then “the complaint must be  
19 dismissed unless the plaintiff can demonstrate that the conviction or sentence has already  
20 been invalidated.” *Heck*, 512 U.S. at 487.

21 It appears that Degen is challenging the constitutionality of his state court criminal  
22 conviction. Consequently, he must demonstrate that his conviction has been overturned to  
23 proceed in an action under § 1983. As he has not done so, his sole relief is a *habeas corpus*  
24 action. The court, therefore, recommends that the complaint be dismissed without prejudice  
25 and without leave to amend.

26 Additionally, the court notes that Defendant Washoe County District Attorney is  
27 absolutely immune from suit under § 1983. See *Imbler v. Pachtman*, 424 U.S. 409, 427,

1 430 (1976) (state prosecutors are absolutely immune from § 1983 actions when performing  
2 functions "intimately associated with the judicial phase of the criminal process."). Similarly,  
3 Defendant Washoe County Public Defender cannot be sued under § 1983, as they are not  
4 acting under color of state law. *Georgia v. McCollum*, 505 U.S. 42, 53 (1992) (when public  
5 defenders are acting in their role as advocate, they are not acting under color of state law  
6 for § 1983 purposes).

#### 7 **IV. CONCLUSION**

8 For the reasons articulated above, the court recommends that Degen's application to  
9 proceed *in forma pauperis* (ECF No. 5) be granted, and his amended complaint (ECF No.  
10 3) be dismissed without prejudice and without leave to amend.

11 The parties are advised:

12 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of  
13 Practice, the parties may file specific written objections to this Report and Recommendation  
14 within fourteen days of receipt. These objections should be entitled "Objections to  
15 Magistrate Judge's Report and Recommendation" and should be accompanied by points  
16 and authorities for consideration by the District Court.

17 2. This Report and Recommendation is not an appealable order and any notice  
18 of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District  
19 Court's judgment.

#### 20 **V. RECOMMENDATION**

21 **IT IS THEREFORE RECOMMENDED** that Degen's application to proceed *in forma*  
22 *pauperis* (ECF No. 5) be **GRANTED**; and

23 **IT IS FURTHER RECOMMENDED** that Degen's amended complaint (ECF No. 3) be  
24 **DISMISSED WITHOUT PREJUDICE AND WITHOUT LEAVE TO AMEND.**

25 **DATED:** 2/28/2020.

26   
27 **UNITED STATES MAGISTRATE JUDGE**